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No. 75-300

In the Supreme Court of the United States

OCTOBER TERM, 1975

PAUL DAVID NOVICK, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, BEN C. DAWKINS, JR., SENIOR JUDGE, AND UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF MANDAMUS AND PROHIBITION
AND
PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners seek writs of mandamus and prohibition requiring a change in the venues of their scheduled trial.

A six-count indictment filed on June 19, 1975, in the United States District Court for the Western District of Louisiana charged petitioners with having violated 18 U.S.C. 1461 by mailing obscene matter from Los Angeles, California, to Shreveport, Louisiana. Prior to

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trial, petitioners moved to have their case transferred to the Central District of California on the grounds (1) that they and their witnesses reside in California and cannot bear the expense of a lawsuit in Louisiana, and (2) that the community standards by which petitioners' conduct must be judged are those of the Central District of California (where the mailings originated and petitioners are domiciled) and not the Western District of Louisiana, a jurisdiction with which petitioners have no familiarity.

In opposing the change of venue, the government noted that its witnesses are largely from Louisiana, that financial problems incurred by petitioners could be alleviated by proceeding *in forma pauperis,* and that a transfer to the Central District of California would effectively terminate the prosecution. In support of the last contention, the government pointed to the ruling of the United States District Court for the Central District of California in *United States* v. *Elkins,* 396 F. Supp. 314 (Pet. App. B). In *Elkins,* which involved a similar prosecution for mailing obscene matter from California to Iowa, the District Court for the Central District of California had dismissed the indictment (after a change of venue from Iowa to California), holding that the contemporary community standards of the Northern District of Iowa were the standards applicable to the issue of the obscenity of the materials in question; that expert testimony concerning those standards would not be adequate to prove the Iowa community standards; and that jurors from the Central District of California

were not qualified to ascertain and apply the contemporary community standards of Iowa on the basis of evidence adduced at a trial in California.

On August 6 and 11, 1975, petitioners' motions for a change of venue from Louisiana to California were denied (Pet. Apps. C, D). The petition filed with this Court for a writ of mandamus or prohibition arises from the denial of relief by the District Court for the Western District of Louisiana.

Petitioners' claim that they are entitled to the issuance of an extraordinary writ is without merit. The circumstances described in their petition are not exceptional, and they have failed to establish that the district court abused its descretion in denying their motions for a change of venue. See Rule 21, Fed. R. Crim. P.; *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249, 257. The correctness of the district court's ruling in this case will be subject to review in the event of a conviction. Petitioners present no compelling reasons for avoiding the regular, orderly course of appellate review by resorting to the All Writs Statute. See *Will* v. *United States,* 389 U.S. 90, 98; *Parr* v. *United States,* 351 U.S. 513, 520–521; see also *Ex parte Fahey,* 332 U.S. 258, 259–260.

Petitioners' explanation for seeking direct review by this Court of the district court's ruling, rather than challenging the denial of their motions for a change of venue in the Court of Appeals for the Fifth Circuit, is that they are in effect attacking the ruling of a district court in the Central District of California in *Elkins* and that the Fifth Circuit has no

power to overturn the decision of a lower court not within its jurisdiction (Pet. 21–23). That explanation is not persuasive. Petitioners were not parties to the litigation in *Elkins,* and have no standing to seek review of rulings made in that litigation.[1] Their claim for relief arises from the decision of a district court in the Western District of Louisiana. That ruling is subject to review by the Fifth Circuit through the customary appellate process following conviction. No exigencies exist that entitle petitioners to avoid the normal intermediate appellate process and seek relief in this Court by way of prohibition or mandamus. Cf. *Platt* v. *Minnesota Mining Co.,* 376 U.S. 240; *Jones* v. *Gasch,* 404 F.2d 1231 (C.A. D.C.).

For the foregoing reasons, it is respectfully submitted that the motion for leave to file a petition for writs of mandamus and prohibition and the petition for writs of mandamus and prohibition should be denied.

ROBERT H. BORK,
Solicitor General.

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[1] Petitioners have pointed out in a letter to the Court, dated October 6, 1975, that the defendants in the original *Elkins* case were reindicted in the United States District Court for the Northern District of Iowa, following dismissal of the earlier indictment in the Central District of California, and that on October 1, 1975, the District Court for the Northern District of Iowa again ordered the case transferred from Iowa to California. For the reasons stated above, we do not believe that these developments justify granting the petition for a writ of mandamus or prohibition filed by petitioners in this case.

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